Supreme Court, U.S.
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No:

In the Supreme Court of the United States

THE ESTATE OF BARBARA RAY, JUDY RICHARD ADMINISTRATRIX,
Petitioner,
v.
KEYSTONE COAL MINING CORPORATION,
Respondent,
and
DIRECTOR OFFICE OF WORKERS COMPENSATION PROGRAMS,
Party in Interest

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I.

Is the Black Lung Benefits Review Board's application of ***Penn -Allegheny Coal Corporation v. Williams***, 114 F. 3rd 22 (3rd Cir. 1997) and its expansive use of **30 U.S.C.A. §923(b)** imposing unreasonable adjudicatory processes and artificial review standards that are contrary to the **Black Lung Benefits Act, [BLB],** and the **Administrative Procedures Act,** [APA], that are not afforded deference under the auspices of ***Chevron v. NDRC***, 467 U.S. 837, 843-844 (1984)?

LIST OF ALL PARTIES

1. The Estate of Barbara Ray, Judy Richard, Administrix Plaintiff, Petitioner

2. Keystone Coal Mining Corporation Defendant, Respondent

3. Director, OWCP, Party in Interest

4. Black Lung Appeals Review Board, Party in Interest

5. Solicitor General, U. S. Department of Justice

6. Office of the Administrative Law Judges, WD of PA.

CORPORATE DISCLOSURE STATEMENT

Pursuant to **Supreme Court Rule of Appellate Procedure 29.6**, Law Care and Attorneys David A. Colecchia and Jeffrey S. Golembiewski make the following disclosures:

1) The inquiry for non-governmental corporate parties is not applicable;

2) The inquiry for non-governmental corporate parties that hold more than 10% of the party's stock is not applicable;

3) The inquiry regarding a publicly held Corporation that is not a party but has a financial interest in the outcome of these proceedings is not applicable.

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OPINIONS AND ORDERS BELOW

On May 17, 1996, Judy Richard, on behalf of her disabled sister Barbara Ray, herein after Ms. Ray filed a claim for survivor benefits under the **Federal Black Lung Act**. Ms. Ray was the disabled adult child of the miner Ralph E. Ray. After denial by the District Director, Claimant appealed to the Office of Administrative Law Judges.

On April 21, 1998, Administrative Law Judge Richard Morgan, [ALJ or ALJ Morgan], granted benefits on Ms. Ray's survivors claim. A copy of the opinion is attached at App. Vol. I Pages 18-61. The Employer appealed to the Benefits Review Board; it vacated and remanded in an unpublished opinion dated May 21, 1999. A copy of the opinion is attached to this petition at App. Vol. I Pages 62-70.

On August 31, 1999, ALJ Morgan [again] issued an opinion awarding benefits. A copy of the opinion is attached to this petition at App. Vol. I Pages 71-80. [Again], the Employer appealed, and [again], the Board on January 29, 2001, vacated in an unreported opinion and [again] remanded the case back to the ALJ. A copy of the opinion is attached at App. Vol. I Pages 81-93.

Claimant then appealed to the Third Circuit Court of Appeals, who dismissed it as interlocutory on August 20, 2001. A copies of the Third Circuit's order is attached to the petition at App Vol. I Pages 161-162.

On August 11, 2003, ALJ Morgan, reversed his prior credibility findings and denied the claim. A copy of the third opinion is attached to this petition at App. Vol. I Pages 94-127. Claimant then appealed to the Board. The Board affirmed in an unreported opinion on September 28, 2004. A copy of the opinion is attached at App. Vol. I Pages 128-141.

Claimant next appealed to the Third Circuit Court of Appeals, which denied the Claimant's appeal in an unpublished memorandum opinion dated December 21, 2005. A copy of the opinion is attached at App. Vol. I Pages 142-159. The Court denied Claimant's request for *en banc* review of the order on January 19, 2006. A copy of the Third Circuit's order is attached at App. Vol. I Pages 160-161.

STATEMENT OF JURISDICTION

A Writ of Certiorari is sought from the December 21, 2005 unpublished opinion

of the Third Circuit Court of Appeals denying the petitioner's appeal. The Court affirmed the ***Board's*** determination that miner Ralph E. Ray did not have pneumoconiosis and that pneumoconiosis did not cause Mr. Ray's death. Hence, his survivor, Barbara Ray, was ineligible for Federal Black Lung Benefits.

This Court has jurisdiction to hear this matter through a Writ of Certiorari pursuant to **28 U.S.C.A. §1254(1)**. This Court has authority pursuant to **28 U.S.C.A. § 1651(9)** to issue all necessary and appropriate writs in aid of its respective jurisdiction that are agreeable to the usages and principles of law.

The time for filing a petition for a Writ of Certiorari commenced on January 19, 2006, when the Third Circuit Court of Appeals denied Claimant's petition for en banc review. The time for filing a petition expires on May 19, 2006 as the result of Justice Souter's Order granting an enlargement of time.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

These are located in the Appendix Volume I Pages 1-17

STATEMENT OF THE CASE

The genesis of this case began when Judy Richard, Claimant, on behalf of her disabled, adult sister, Barbara Ray (now deceased), filed a claim for black lung benefits on May 12, 1996. Ms. Ray was the disabled adult child of the deceased coal miner, Ralph E. Ray. Ms. Ray, who never married, was afflicted with Down's syndrome and Cerebral Palsy. The Social Security Administration deemed her disabled since her birth.

Mr. Ray worked for the Respondent, Keystone Coal Mining Corporation as an underground miner for at least thirteen years until his retirement in February 1987. Although Mr. Ray was a smoker, he was exposed to copious amounts of coal dust while employed as a beltman.[1] Mr. Ray worked in this capacity until his health deteriorated in 1987 and he could no longer work.

When he retired, Mr. Ray suffered from a myriad of respiratory ailments. These included emphysema, chronic obstructive

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[1] A beltman shovels and diverts coal debris and residue on the coal conveyor belt in a dusty underground room while the belt carries the mined coal to the surface.

pulmonary disease (hereinafter COPD), chronic bronchitis, and related pulmonary illnesses. Mr. Ray's underlying pulmonary condition worsened after he retired from coal mining, and, he died on April 18, 1996. Thereafter, his daughter, Barbara Ray, through her sister, Judy Richard, filed a new application for survivor benefits on May 12, 1996.

The District Director [hereinafter DD] approved the request for benefits on October 9, 1996. Subsequently, the DD issued a "final determination," that was contrary to his previous finding, and he denied benefits on February 7, 1997. Ms. Richard appealed. On April 21, 1998, following trial, ALJ Morgan reinstated the benefits award relying on the opinion and testimony of Dr. Michael Wald.[2] The

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[2] Dr. Wald opined that Mr. Ray was afflicted by pneumoconiosis as defined by **20 C.F.R. §718.201**. Likewise, Dr. Wald testified that exposure to coal dust was a contributing factor in the progression of Mr. Ray's COPD and emphysema, and thereby hastened his death. Deposition of Dr. Wald, pp. 19-20, 40, & 43. In addition, Dr. Sinnenberg, the Employer's expert, testified Mr. Ray had mild medical pneumoconiosis. Judge Morgan discounted the opinions of the Employer's physicians Drs. Scott, Tutuer, and Bush due to their reports being over ten years old. Judge Morgan also gave little weight to these opinions because

Employer appealed. On May 21, 1999, the Benefits Review Board vacated and remanded the ALJ's decision based on his alleged failure to discuss one (1) CT scan. The Board's relied upon the Third Circuit's holding in ***Penn-Allegheny Coal Co. v. Williams*** 114 F.3d. 22 (3rd Cir. 1997), hereinafter ***Penn-Allegheny***.

Upon this first remand, the ALJ [again] awarded benefits on August 31, 1999;[3] [again], the Employer appealed. During this time, Barbara Ray died. On January 21, 2001, the Board, [again], vacated the award and remanded the decision to the ALJ [again] utilizing the rationale of ***Penn-Allegheny***. The Board again disagreed with the ALJ's weighing of the evidence and found error when he took judicial notice of a medical treatise on pneumoconiosis.

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these physicians all believed Mr. Ray's lung condition was solely related to his cigarette smoking and never considered the legal definition of the disease.

[3] In Judge Morgan's second opinion, he again discounted Dr. Scott's opinion because he did not consider that Mr. Ray may have suffered from industrial bronchitis related to coal dust exposure. Again, Judge Morgan agreed with Dr. Wald's opinion that exposure to coal dusts was causally related to progression of Mr. Ray's C.O.P.D, which in turn shortened his life.

Upon this third remand, the ALJ reversed himself and denied benefits. This reversal was not based on a technical legal issue, an error of law, or an abuse of discretion. Rather, it was based on a radical *de novo* reassessment of the record, including the weight and credibility of the medical evidence.[4] The ALJ, after his third review of the record, abandoned the entire edifice of his prior fact-finding.

Ms. Richard appealed and raised issues including the law of the case and the scope and standard of review. This time, unlike the prior two appeals, the Board affirmed the ALJ's third decision. Ms. Richard then appealed to the Third Circuit Court of Appeals.

Ms. Richard contested the Board's application and interpretation of ***Penn-***

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[4] Judge Morgan's first two opinions relied heavily on Dr. Wald's uncontroverted opinion that Mr. Ray's pulmonary condition worsened as a result of both coal dust exposure and cigarette smoking. Nonetheless, he expended two (2) years scouring the medical data and records to locate evidence to contradict Dr. Wald's opinion. Now, in his third opinion, Judge Morgan 'magically' found Drs. Bush, Tutuer and Scott's stale hearsay medical opinions credible.

Allegheny. On December 19, 2005, the Third Circuit denied the appeal. In doing so, the Court abdicated insouciantly its judicial responsibility to examine the proscribed scope and standard of judicial review. The Third Circuit ignored inexplicably, Judge Morgan's reversal of his credibility findings that he derived amidst the first and second remands. On January 19, 2006, the Third Circuit summarily denied Claimant's petition for *en banc* review.

Presently, after ten (10) years elapsed since the DD's initial award of benefits and the subsequent deaths of the Claimant miner and his disabled daughter, the daughter's Administratrix petitions this Court to grant a Writ of Certiorari.

REASONS FOR THE WRIT OF CERTIORARI

Barbara Ray, miner Ralph E. Ray's disabled adult daughter was denied Federal Black Lung benefits because of incessant, repetitive, and baseless remands that caused an unconscionable administrative delay. The delay in this matter was so egregious that Ms. Ray died before resolution of the benefits award issue. The error that deprived Ms. Ray of benefits is not unique to this case, but is endemic to the Black Lung Benefits review system.

This Petition is necessary so this Court may correct a ubiquitous error that causes incessant serial remands to the ALJ, and in turn, imposes an unconscionable and egregious administrative delay. This unconstitutional abuse of administrative procedure deprives all litigants of prompt resolution of their claims and undermines the ALJ's appointed province as the fact-finder. In its opinion, the Third Circuit ignored this issue without justification.

The Benefits Review Board and the Third Circuit justified their decisions as consistent with **30 U.S.C.A. §923(b)** and the ***Penn-Allegheny*** standard of review. This statute and the ***Penn-Allegheny*** holding combine to create burdensome adjudicatory procedures and unreasonable appellate standards of review, which are erroneous, and aberrant to the requirements of the **Administrative Procedures Act. 5 U.S.C.A. §§§ 554, 556, 557; 5 U.S.C.A. §706(2) (A) & §706(2) (E)**. The Department of Labor, Director of the Office of Worker's Compensation Programs, [Director], the Black Lung Benefits Review Board, [Board], and the Third Circuit corrupt and misapply the statutory scheme of the **Federal Black Lung Act. 30 U.S.C.A. §901 et. seq**. The Director's interpretation of its mandate is inconsistent with the law, and is not entitled to deference under the

auspices of ***Chevron v. NRDC***, 467 U.S. 837 (1984) [Hereinafter Chevron]

A compiled review of applications, ALJ trials, and appeals reveal an astonishing statistic: Only eight per cent (8%) of Black Lung claims result in a benefits award. [See **Due Process, Black Lung, And The Shaping of Administrative Justice** by Brian C. Murchison. 54 Admin. L. Rev. 1025 at 1048.] Mr. Murchison identified four systemic defects: 1) judicial imprecision about the definition of the disease; 2) substantial imbalance between Claimants and Employers to finance evidentiary development; 3) judicial confusion between the required causal link between the disease and the disability, and, 4) the lack of clarity as to the weight accorded to the medical opinion of a miner's treating physician. ***Id.*** at 1048. This Petition addresses the first three defects identified by Mr. Murchison.

Because of the Board's action and the Director's regulations, a divergence of administrative treatment and scope of reviews flow from several federal judicial circuits. The Third and Fourth Circuits apply a different standard than the Sixth and Seventh Circuits. Cf. ***Penn-Allegheny Coal Corporation v. Williams***, 114 F. 3d. 22 (3rd Cir. 1997); ***Island Creek Coal Company v.***

Compton, 211 F. 3d. 203, (4th Cir. 2000); ***Wolf Creek Collieries v. Director, O.W.C.P.***, 298 F. 3d. 511 (6th Cir. 2002); ***Midland Coal Company v. Director, O.W.C.P.*** 358 F. 3d. 857 (7th Circ. 2004), ***Peabody Coal Company and Old Republic Insurance Company, v. Estate of J.T. Goodloe***, 299 F. 3d. 666 (7th Cir. 2002). In the Sixth and Seventh Circuits, Dr. Wald's testimony is 'substantial evidence,' while it is not substantial evidence in the Third and Fourth Circuits due to their obdurate reliance on ***Penn-Allegheny*** and an expansive interpretation of **30 U.S.C. §923(b).**

Certiorari is necessary to address this divergence and to correct the systematic breakdown of the administrative appellate review process.

I. The Director and the Board's oppressive interpretation of 20 C.F.R. §718.202(a) and their misapplication of the scope and standard of review set forth in *Penn-Allegheny* is aberrant to the BLB and the APA and cannot be afford *Chevron* deference.

A. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

In ***Chevron***, this Court enumerated the standard a reviewing body must utilize when addressing agency policy and interpretation of its regulations. ***Chevron*** stands for the principle that deference must be accorded to an Agency's reasonable interpretations of a statute that it administers. ***Chevron, Id.*** See also, ***Pauley v. BethEnergy Mines, Inc.***, 501 U.S. 680 pp. 696-697, (1991); ***National R.R. Passenger Corp. v. Boston & M.E. Corp.***, 503 U.S. 407, 417 (1992). The deference outlined in ***Chevron*** is to the Director who is appointed with the Congressional mandate to interpret and apply the **Federal Black Lung Act**. ***Bonessa v. U.S. Steel Corporation***, 884 F.2d. 726 (3rd Circ. 1989).

B. ***Penn-Allegheny*** and the Underlying Statutory Scheme For Black Lung Benefits:

Penn-Allegheny concerned a petition for review by the Penn-Allegheny Coal Company from an ALJ award of benefits to the widow of a coal miner. The medical evidence in ***Penn-Allegheny***, as in the case at bar, was abundant, and reflected a divergence of opinions from competent medical authorities. ***Id.*** at 23-24. The ALJ measured the applicable medical data, and based his conclusion on the x-ray evidence, the autopsy evidence, and the medical

opinion evidence. ***Id.*** The Board affirmed the ALJ's decision solely upon the ALJ's interpretation of the x-ray evidence. ***Id.*** at 24.

The Third Circuit Court of Appeals abandoned the Board's approach based on the Director's request as it set forth in its brief. ***Id.*** at 25. Yet, it affirmed the ALJ's decision, on an alternative ground, holding instead that all relevant evidence must be "weighed together" to determine the existence of the disease. ***Id.*** at 25-26.

The crux of the Third Circuit's holding was the four dissimilar methods of establishing Black Lung Benefits must be read in the conjunctive, rather than the disjunctive. ***Id.*** at 25. Using this standard, the Third Circuit applied an improper and expansive *de novo* standard and scope of review to ***all*** evidence of record instead of reviewing the factual findings to determine if they were supported by substantial evidence. ***Id.*** at 25-26. As a result, the Court found the Board's determination, although flawed, was harmless. ***Id. Supra.***

The Black Lung program was enacted to compensate coal miners who suffer or suffered from respiratory ailments caused by, or significantly related to, inhalation of coal dust. The **Black Lung**

Benefits Act defines pneumoconiosis broadly:

> **Any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic or obstructive pulmonary disease arising out of coal mine employment. 20 C.F.R. §718.201 (a) (2).**

The term arising out of coal mine employment means: **Any chronic pulmonary disease significantly related to or substantially aggravated by dust exposure in coalmine employment. 20 C.F.R. §718.201(b).**

The terms 'substantially aggravated by', or 'significantly related to' do not require medical causation of a respiratory condition resulting from coal dust exposure. **Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969 as amended. 65 F.R. 79920, 79946-79949 (2000).** Rather, these terms only require a worsening of the miner's underlying pulmonary health due to coal dust exposure. ***Id.*** The regulations acknowledge and galvanize the fact that pneumoconiosis is a latent, progressive disease, which may first

become detectable only after cessation of coal mine dust exposure. **20 C.F.R. §718.201(c).**

Pneumoconiosis is established in four (4) separate and distinct manners:

> (1) **A chest x-ray . . . .**
>
> (2) **A biopsy or autopsy . . . .**
>
> **(3) The presumptions described in 20 C.F.R. §718.304, §718.305, or §718.306 are applicable...**
>
> **[And most significant]**
>
> **(4) ...If *a* physician exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers, or suffered from, pneumoconiosis as defined in §718.201. . . . . 20 C.F.R. §718.202 (a) (1), (a) (2), (a) (3), and (a) (4) [Emphasis added.]**

No claim for benefits may be denied *solely by a negative chest x-ray*. 20 C.F.R. §718.202(b). [Emphasis Added.]

These broad definitions exist to implement the legislative policy intending to compensate coal miners whose pulmonary

disability, or death, is related to coal dust exposure. The statutory language promotes benefits awards. See **1972, U.S. Code Cong. & Admin. News, 2305, 2312-2316 Pub. L. No. 92-303**; ***Grundy Mining v. Flynn***, 353 F.3d 467 (6th Cir. 2003).

To establish death due to pneumoconiosis, the miner's survivor must prove:

> 1. **That [the miner] had pneumoconiosis (as established by any of the previously enumerated criteria);**
>
> 2. **That pneumoconiosis arose out of coal mine employment;**
>
> 3. **The miner's death was due to pneumoconiosis as provided by this section. 20 C.F.R. §718.205 (a) (1), (a) (2), and (a) (3). Emphasis added.**

The "due to" portion of the regulation includes:

1. Death where pneumoconiosis was the cause.

2. Death where pneumoconiosis was a complication. (or)

3. The irrebutable presumption of pneumoconiosis applies. **20 C.F.R. 718.205 (c) (1) (2) and (3).**

Survivors remain eligible for benefits when the miner's death was not caused by a traumatic injury, or the principal cause of death was related to pneumoconiosis, or the evidence establishes that pneumoconiosis was a substantially contributing cause of death. **20 C.F.R. §718.205(c) (4).** The term, "substantially contributing cause of death," requires the miner to demonstrate their pneumoconiosis as defined by **20 C.F.R. §718.201** shortened their life. ***Lukosevicz v. Director, O.W.C.P.***, 888 F.2d. 1001 at 1005 (3rd. Circ. 1989). **See also 20 C.F.R. §718.205(c) (5).** Under these rules, the miner's survivor qualifies for Federal Black Lung benefits if ***one*** physician establishes 1) exposure to coal dust worsened or accelerated the miner's pulmonary state and 2) the underlying pulmonary condition shortened the miner's life.

In a Black Lung claim the ALJ is the ultimate arbiter of fact, whose exclusive purview is to determine factual and evidentiary matters. The Board's role is to determine whether the findings of fact and conclusions of law on which the ALJ's decision was based are supported by

substantial evidence and in accordance with the law. **20 C.F.R. §802.301(a).**

Specifically, **20 C.F.R. §725.477(b)** provides the only content of a decision and order, "shall contain a basis for the statement of the order..., findings of fact, conclusions of law, an award, rejection or other appropriate paragraph containing the action of the administrative law judge.... A decision and order shall be based on the record made before the administrative law judge." ***Id.*** The ALJ's decision becomes order final after thirty (30) days. **20 C.F.R. §725.479(a).** The ALJ must consider all medical records and reports in making his decision. **30 U.S.C.A. §923(b).**

C. The Black Lung Adjudicatory and Review Procedures Are Aberrant To The APA.

Within the statutory scheme for review, the **Administrative Procedures Act** (hereinafter APA) applies. **30 U.S.C.A. §932(a), citing to 33 U.S.C.A. §919(d).** The **APA** is Congress' mandate to apply uniform principles of decision-making and administrative appellate review. ***Vermont Yankee Nuclear Power Co. v. N.R.D.C.***, 435 U.S. 519 (1978). See Also ***ABF Freight Systems, Inc. v. N.L.R.B.***, 510 U.S. 317 (1994). The **Act** requires: a) the

findings and conclusions, and the reasons or basis, therefore, on all ***material*** issues of fact, law or discretion presented on the record; and b) the appropriate rule, order, sanction, relief, of denial thereof. [Emphasis added.] **5 U.S.C.A. §§ 554, 557**. The **APA** does not require an ALJ to consider ***all*** evidence of record and it ***mandates*** exclusion of irrelevant or cumulative evidence. **5 U.S.C.A. §556(d)**. The **APA** applies a substantial evidence standard of review of all factual findings, while it applies an error of law standard to legal conclusions. **5 U.S.C.A. §706(2) (A) & §706(2) (E)**.

Substantial evidence is more than a scintilla, but less than a preponderance. ***Richardson v. Perales***, 402 U.S. 389 (1971). It is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. ***Wolf Creek Collieries v. Director, O.W.C.P Supra***; ***Ickes v. FAA***, 299 F. 3d. 260 (3rd Cir. 2002). A decision should not be overturned even if plausible alternative interpretations of evidence would support a contrary view. ***Secretary of Labor, Mine Safety and Health Admin. v. Federal Mine Safety and Health Review Commission.*** 111 F.3d. 913 (DC Cir. 1997). A decision should only be overturned when there is insufficient evidence in the record for the findings and

conclusions, or the inferences to be derived therefrom; as opposed to whether there is any evidence to support findings of the unsuccessful party. ***Bath Iron Works v. U.S. Dept. of Labor***, 336 F.3d. 51 (1st Cir. 2004); ***Santana Albarran v. Ashcroft***, 393 F.3d. 699 (6th Cir. 2005). ***McGee v. Reliance Standard Life Insurance Company***, 360 F.3d. 921 (8th Cir. 2004).

D. ***Penn-Allegheny*** **and the Director's mandate to consider and 'weigh together,' all evidence constitute a nebulous evidentiary standard of review that allows the Board to seize and manipulate the fact-finding duties that are the exclusive province of the ALJ.**

Penn-Allegheny and notion that the Black Lung regulations mandate complete evidentiary examination does not represent the tenets inherent in the **APA** or the **Black Lung Act.** Historically, a reviewing Court's focus is whether the evidence already entered is 'material' as opposed to whether it was 'considered' or was 'weighed together.' This 'material' aspect, of evidentiary review is the core of the absurdity of the ***Penn-Allegheny*** holding, and **30 U.S.C.A. §923(b)**. Because the Director, the Board, and the Courts disregard the materiality aspect of appellate

review, Black Lung cases are repetitiously and unnecessarily remanded based upon *pro lix* and cumulative evidence regurgitated incessantly to the detriment of all parties.

If evidence is deemed 'material', it must be probative, relevant, and must give rise to the possibility that it would have changed the outcome. ***Szubak v. Secretary of Health And Human Services***, 745 F. 2d. 831 (3rd. Cir. 1984); ***Pollard v. Halter***, 377 F.2d. 183 (2nd Cir. 2004); ***Castillo v. Barnhart***, 325 F.3d. 530 (5th Cir. 2005). For evidence to be relevant and probative, it must be more than cumulative. ***MaKonnen v. INS***, 44 F.3d 1378 (8th. Cir. 1995).

Penn-Allegheny and the Director's requirements create the presumption that every piece of evidence is relevant and material to the decision instead of reviewing the record as a whole to determine if the findings necessary to the decision are supported by substantial evidence. Cumulative, stale, or inaccurate medical evidence now is routinely passed off as material without the opportunity for a party to exercise its right of cross-examination. [See **Due Process, Black Lung And The Shaping Of Administration of Justice *Supra.*** at 1058-1064.] Black Lung adjudicatory and review standards are unlike any other form of American administrative

jurisprudence. [See **Cooley R. Howarth, Jr. Restoring the Applicability of the APA's Adjudicatory Procedures,** 56 Admin. L. Rev. 1043 2004; Russell L. Weaver, **Judicial Interpretation of Administrative Regulations: An Overview**, 53 U. Cin. L. Rev. 681, (1984)].

It is inaccurate to characterize Black Lung appellate review as a substantial evidence standard. Instead, it is more demanding, much as the clear and convincing burden of proof is more demanding than proof by a preponderance of the evidence. ***Penn-Allegheny*** and the Director's regulations create an artificial requirement of compelling medical proof of scar reaction, or medical certainty that is contrary to the plain language of the regulatory definitions. **20 C.F.R. §718.201(a) (1) & (a) (2); 20 C.F.R. §718.202** (generally).

The parties and the ALJ are placed in the difficult position of trying to determine just how much, and how relevant, medical evidence is, and what exactly constitutes "weighed together." The Board has its own view on what constitutes the weighing together of evidence, and the ALJ carries the unenviable burden of drafting a decision that conforms to the Board's view. The Board, applying a profound hyper-technical

analysis finds an ALJ's failure to discuss any item of evidence as reversible error. Any perceived deficiency results in an unnecessary remand, justified by reference to ***Penn Allegheny***. The administrative process is relegated to a farce.

The danger is ALJs will routinely issue Black Lung benefits decisions based upon stale, cumulative, and inaccurate medical evidence in order to avoid a Board decision holding that the ALJ failed to weigh such evidence together. ***Murchison Supra*** at 1054. ALJs will give weight to evidence that contradicts the express Congressional finding that exposure to coal dust worsens or causes COPD. ***Eagle v. Armco Inc.***, 943 F.2d 509, 511 n2 (4th Cir. 1991) citing **30 U.S.C.A. 901(a), 902(b)**. ALJs now must practice defensive decision-making and delve into clinical and medical analysis reserved to physicians. This administrative interpretation is not entitled to ***Chevron*** deference.

Penn-Allegheny and **30 U.S.C.A. §923(b)** rest upon two flawed assumptions: 1) The requirements of **20 C.F.R. §718.202** are to be read together in the conjunctive, and 2) that ***all*** evidence can be "weighed together." In ***Penn-Allegheny***, Judge Sloviter observed, "that the regulation did not list the methods [of determining the

existence of the disease] in the disjunctive." ***Penn-Allegheny Supra*** at 25. This statement flouts the well-settled grammatical rule that a period indicates one complete thought. **Homer Andrew Watt, Oscar Cargill, and William Charvat, New Highways in College Composition**, 144, 961, 985, 990 (1946). Obviously, the Director knew how to use "and," or a semi-colon if it desired the regulation to be read in the conjunctive.

Further, the Director promulgated new regulations concerning the definition of the disease and the determination of the disease state. Nowhere in the revised regulations does the Director implement the ***Penn-Allegheny*** standard and require the four methods of determining the existence of the disease be read in the conjunctive. **Regulation Implementing the Federal Coal Mine Safety Act of 1969 as amended** 65 FR 79920 (2000). Rather, the Director promulgated a relaxed rule for black lung Claimants to avoid burdensome State Workers' Compensation rules. **Regulations Implementing the Federal Coal Mine Safety Act of 1969 as amended** 65 FR 79920 79946-79947 (2000).

The Board and the Third Circuit disregard a critical point: Only errors involving assessment of the weight and

credibility of material medical evidence justifies remand. An ALJ properly considers evidence simply by being aware of it and contemplating it. Consideration does not require an ALJ to provide an express assessment of the weight and credibility of a particular piece of evidence. ***Old Ben Coal Co. v. Scott***, 144 F.3d 1045 (7th Cir. 1998). The ALJ is required to review the record, determine the relevancy of the evidence, and exclude irrelevant, immaterial, or cumulative. **5 U.S.C.A. §556(d)**; ***Underwood v. Elkay Mining,*** 105 F.3d 946 (4th Cir. 1997); ***Old Ben Coal supra***. Under the **APA** and the **Black Lung Act**, it is the ALJ's exclusive purview to resolve conflicts in the evidence.

Ms. Ray needed to prove exposure to coal dust worsened her father's pulmonary condition and the worsening of his pulmonary condition shortened his life. ***Mullins Coal Company of Virginia v. Director OWCP***, 484 U.S. 135 (1987); ***Midland Coal Company v. Director OWCP***, 358 F.3d 486 (7th Cir. 2004). Ms. Ray satisfied her burden of proof through Dr. Wald's testimony. Judge Morgan's acceptance of Dr. Wald's testimony as credible was sufficient substantial evidence to support the conclusion Mr. Ray had pneumoconiosis and that it was a factor in

shortening his life. Both Board remands were unwarranted.

A catalogue of X- rays, CT-scans, and autopsy slides are only material to determine the existence of scar tissue present in the medical form of the disease. These tests are not material to understanding progression of any underlying pulmonary disease, nor do these tests replace medical criteria supporting the legal aspects permitting an award of benefits. See generally, ***Mullins supra at 148-149, 151***; ***Kowalchick v. Director, Office of Workers' Compensation Programs, United States Dept. of Labor***, 893 F.2d 615 (3rd. Cir. 1990).

X-rays, CT scans, and autopsy slides, cannot be weighed the same as a physician's medical opinion as these tests only form the foundation of a medical opinion. ***See Mullins supra*** at 147-149; ***Ferguson v. Schweiker***, 765 F.2d 31, 37 (3d Cir. 1985) (an ALJ may not independently review and interpret laboratory reports). An ALJ may not weigh these forms of evidence in the absence of a medical opinion and thereby impermissibly align his or her own expertise against that of a physician who presented competent evidence. ***Id.*** The Board and Third Circuit ignored this obvious distinction, by requiring the ALJ "weigh

together" such evidence outside the context of a medical opinion.

It is illogical for the Director to insist that all evidence of record be considered and "weighed together." Pneumoconiosis is a latent and progressive disease, which may not be apparent until after the miner ceases coal mining. **20 C.F.R. §718.201(c)**. Older medical evidence gradually diminishes in value as newer medical evidence becomes available. ***See Mullins supra at 151***.

Medical opinions that refuse to consider the contributions of coal dust exposure to a miner's COPD are of dubious value in light of the express Congressional finding to the contrary. ***Midland Coal v. Director OWCP***, 358 F.3d 486 (7th Cir. 2004). Diagnostic evidence is of marginal value when there is conflicting or cumulative, medical data available for examination, or when it is not relevant for legal definition analysis. ***Mountain Clay, Inc. v. Spivey***, 2006 Fed. App. 0141N, 2006 WL 452337, filed February 23, 2006; ***Old Ben Coal supra*** at 1048. Instead, it is the ALJ's province to make a credibility determination. ***Smith v. Chater, Commissioner of Social Security***, 99 F.3d 635 (4th. Cir. 1996) (The duty to resolve conflicts in the evidence rests with the ALJ, not the reviewing Court, and an ALJ's

decision must be sustained, even if the Court disagrees with it, provided the determination is supported by substantial evidence).

Penn-Allegheny shifts the balance of power in the Black Lung system from the ALJ to the Board. The Board does not have unrestricted authority to review of a case. **20 C.F.R. §802.301**. The Board's power to correct legal error cannot be used as a bludgeon to exceed its limiting regulations and provide it with *de novo* review powers that override the ALJ's authority as the ultimate fact-finder. ***Peabody Coal Co. v. Odom***, 342 F.3d 486 (6th Cir. 2003).[5]

The ***Penn-Allegheny*** standard causes an endless cycle of indecision in the Black Lung System. This breakdown of the administrative process afflicts Employers and Claimants alike. ***See Consolidation Coal Co. v. Borda***, 171 F.3rd 175 (4th Cir. 1999); ***Lane Hollow Coal Co. v. Director, O.W.C.P.***, 137 F. 3rd 799 (4th Cir. 1998).

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[5] Judge Scirica recently opined: No principle of administrative [law] or common sense requires [an administrative tribunal or appellate Court] to remand a case in quest of a perfect opinion unless there is reason to believe that the remand might lead to a different result. ***Lett v. Barnhart***, 2003 U.S. Appeal Lexis 9005 at page 8. [***Citing Fisher v. Bowen***, 869 F.2d. 1055, 1057 [7th Circ. 1989.]; See also ***Old Ben Supra***.

The ***Penn-Allegheny*** standard and the Director's mandate to consider all evidence violates fundamental principles of Due Process. It burdens ALJs because far too many opinions ricochet to remand. It increases costs; it delays finality, and provides litigants little certainty of any result. [See **Due Process, Black Lung, And The Shaping of Administrative Process, *Supra.*]** Employers are caught paying large benefit awards due to administrative delays, or Claimants are burdened by repaying years of benefit awards previously received. **20 C.F.R. §725.540(b) & (d)**. Circuit Courts justifiably criticized this frequent and unconscionable delay. ***Soubik v. Director, O.W.C.P.*** 366 F. 3rd. 226 (3rd. Circ. 2004); ***Amax Coal Company v. Franklin,*** 957 F.2d. 355 (7th Circ. 1992).

The ***Penn-Allegheny*** standard also hinders Claimants' access to legal counsel because many advocates will refrain from becoming involved if they are not paid at the outset or until if (and when) they ultimately prevail on the merits. **20 C.F.R. §§ 725.366(a), 725.367(a)**. As in this case, it may take over a decade for the Black Lung system to produce a final decision.

Ms. Ray's claim would be analyzed differently if she brought it in the Sixth or

Seventh Circuits, where these Courts apply a substantial evidence analysis. The Sixth and Seventh Circuits would decide whether Dr. Wald's testimony was sufficient to support a conclusion, instead of concerning themselves whether the ALJ considered and weighed together all the evidence.

In the event an ALJ did not consider evidence, the Sixth and Seventh Circuits' would focus upon its materiality and defer to the statutory scheme. The Sixth and Seventh Circuit **will typically** order a remand only **where that remedy** would change the result, instead of presuming that such evidence automatically changes the result as is done in the Third and Fourth Circuits.

Conclusion

For all of the above reasons, this Court should grant the Petition for Certiorari.

Respectfully Submitted,

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